



DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2022-0127]

Controlled Substances and Alcohol Use and Testing: Application for Exemption; The Trucking Alliance

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of final disposition; denial of application for exemption.

SUMMARY: FMCSA announces its decision to deny the application from The Alliance for Driver Safety & Security, also known as the Trucking Alliance (as referred to herein), for an exemption from the Federal Motor Carrier Safety Regulations (FMCSRs) “to amend the definition of actual knowledge to include the employer’s knowledge of a driver’s positive hair test, which would require such results be reported to the FMCSA Drug and Alcohol Clearinghouse (“Clearinghouse”) and to inquiring carriers.” The Trucking Alliance, is comprised of the following motor carriers: Cargo Transporters; Dupre’ Logistics LLC; Frozen Food Express; J.B. Hunt Transport, Inc.; KLLM Transport Services; Knight Transportation; Maverick Transportation LLC; Schneider; Swift Transportation; USXpress; and May Trucking Company. The applicant believes that hair testing enhances public safety by providing a longer detection window for controlled substance use and by minimizing the opportunity for fraud in the specimen collection process. The applicant asserts that because hair testing is more reliable and accurate than urine testing, it is the “appropriate drug testing method for preemployment and random testing protocols.” The applicant asserts that there will be no reduction in safety benefits if the exemption is granted. FMCSA analyzed the application and public comments and determined that the Agency lacks the statutory authority to grant the

exemption request to amend the definition of actual knowledge to include the employer's knowledge of a driver's positive hair test.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Clemente, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: 202-366-2722. E-mail: richard.clemente@dot.gov. If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation

Viewing Comments and Documents

To view comments, go to www.regulations.gov, insert the docket number “FMCSA-2022-0127” in the keyword box, and click “Search.” Next, sort the results by “Posted (Newer-Older),” choose the first notice listed, and click “View Related Comments.”

To view documents mentioned in this notice as being available in the docket, go to www.regulations.gov, insert the docket number “FMCSA-2022-0127” in the keyword box, click “Search,” and chose the document to review.

If you do not have access to the internet, you may view the docket by visiting Dockets Operations in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9317 or (202) 366-9826 before visiting Dockets Operations.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315(b) to grant exemptions from certain Federal Motor Carrier Safety Regulations (FMCSRs). In accordance with 49 U.S.C. 31315(b)(6)(A) and 49 CFR 381.315(a), FMCSA must

publish a notice of each exemption request in the *Federal Register* (). and provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the *Federal Register* (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Background

Federal Regulatory Requirements

For purposes of 49 CFR part 382, subpart B, *actual knowledge*, as defined in 49 CFR 382.107, means an employer's actual knowledge that the driver has engaged in the prohibited use of alcohol or controlled substances. Employers have actual knowledge of prohibited use based any of the following events: they directly observe a driver using alcohol or controlled substances, they receive information provided by the driver's previous employer(s), they are aware that a driver was issued a traffic citation for driving a commercial motor vehicle (CMV) while under the influence of alcohol or controlled substances, or the employee admits alcohol or controlled substance use, except as provided in 49 CFR 382.121. An employer's direct observation of prohibited use does not include observation of employee behavior or physical characteristics sufficient to warrant reasonable suspicion testing under 49 CFR 382.207. As used in the definition of

actual knowledge, the term *traffic citation* means a ticket, complaint, or other document charging driving a CMV while under the influence of alcohol or controlled substances.

Statutory Requirements for FMCSA's Drug and Alcohol Testing Program

FMCSA drug and alcohol use and testing regulations are authorized by the Omnibus Transportation Employee Testing Act of 1991 (OTETA) (Pub. L. 102–143, Title V, 105 Stat. 917, at 952, codified at 49 U.S.C. 31306). Section 31306(c)(2) requires that DOT follow the Department of Health and Human Services' (HHS) Mandatory Guidelines for technical and scientific issues related to testing for controlled substances. The Agency acknowledged in its Notice of exemption request (87 FR 52105 (Aug. 24, 2022)) (“the August 24, 2022 Notice”) that FMCSA currently lacks the statutory authority to grant the Trucking Alliance’s request for exemption because HHS has not yet issued final Mandatory Guidelines for hair testing. In addition, in section 5402(b) of the Fixing America’s Surface Transportation Act (FAST Act) (Pub. L. 114 94, 49 U.S.C. 31306 note) (Dec. 4, 2015)), Congress required HHS “not later than one year after . . . this Act, . . . issue scientific and technical guidelines for hair testing as a method of detecting the use of controlled substance for purposes of section 31306 of title 49, United State Code.” The FAST Act also amended OTETA by adding a requirement that FMCSA’s drug and alcohol testing regulations permit the use of hair testing as an acceptable alternative to urine testing for pre-employment drug testing, and for random drug testing when the driver was subject to pre-employment hair testing (49 U.S.C. 31306(b)(1)(B)) and that such regulations include an exemption for hair testing for CMV operators with established religious beliefs that prohibit the cutting or removal of hair.

The Conference Report accompanying the FAST Act noted that “[t]he FMCSA has informed the conferees, and the conferees agree that *nothing in section 5402 authorizes the use of hair testing as an alternative to urine tests until the U.S. Department of Health and Human Services establishes federal standards for hair testing*” (emphasis added).[

H.R. Rep. 114–357, at 506 (Dec. 1, 2015)] HHS issued proposed Mandatory Guidelines for Federal Workplace Drug Testing Using Hair (HMG) in 2020 (85 FR 56108 (September 10, 2020)). However, HHS has not yet issued a final version of the HMG.

Applicant's Request

The Trucking Alliance applied for “an exemption from 49 CFR 382.107 to amend the definition of actual knowledge to include the employer’s knowledge of a driver’s positive hair test, which would require such results be reported to the FMCSA Drug and Alcohol Clearinghouse (“Clearinghouse”) and to inquiring carriers as required to comply with 49 CFR 391.23.”

IV. Method to Ensure an Equivalent or Greater Level of Safety

The applicant believes that public safety is improved using hair testing because drug use is more accurately detected with hair testing than with urine testing. According to the application, the Trucking Alliance motor carrier members that conduct non-DOT hair testing have found it is more effective in eliminating lifestyle drug users from the CMV driver pool, noting it provides “a better opportunity to learn of such drug usage through hair analysis because of the longer 90-day window for detection.” The applicant also notes that the collection of hair samples is less invasive than urine collection and minimizes the possibility the sample will be substituted or adulterated since hair collections are directly observed. The applicant, citing studies confirming the efficacy and accuracy of hair testing, asserts that previous concerns that hair testing results in false positive test results for African Americans, have been addressed by improvements in the testing methodology. The applicant also cited court cases upholding the use of hair testing to detect illicit drug use in the workplace and in connection with custody and parole compliance. The application sets forth detailed protocols for the collection and testing of hair samples, including laboratory standards and cut-off levels, which the Trucking Alliance members “propose” to follow if the exemption request is granted. The

application states that Trucking Alliance members “are not seeking to be exempt from complying with the Federal controlled substance and alcohol use and testing regulations but merely to allow the compliance to take place in an enhanced form – hair testing combined with urinalysis.”.

V. Public Comments

On August 24, 2022, FMCSA published The Trucking Alliance’s application and requested public comment [87 FR 52106]. The Agency received 113 total comments; 31 filed in support, 70 filed in opposition, and 12 other filers had no position either for or against the exemption request.

A common point forwarded by comments in opposition, notably from the Owner-Operator Independent Driver’s Association (OOIDA), the International Brotherhood of Teamsters (IBT) and the National Association of Small Trucking Companies (NASTC) is that the FMCSA lacks the current statutory authority to grant the exemption request from the Federal Motor Carrier Safety Regulations (FMCSRs) to amend the definition of actual knowledge to include the employer's knowledge of a driver's positive hair test, which would require such results be reported to the DACH and to inquiring carriers. OOIDA specifically commented: “as stated in the notice of application for exemption, the Department of Health and Human Services (HHS) has not finalized the September 2020 proposed hair testing guidelines nor have they been adopted by the Department of Transportation. The Clearinghouse must employ proven testing protocols, equipment, and methodology that is scientifically controlled so that all testing follows specific procedures using labs that have been approved by the Substance Abuse and Mental Health Services Administration (SAMHSA). The Clearinghouse should not accept the results of any hair follicle testing considering the inconsistencies and inaccuracies involved.”

Similarly, the IBT commented: “ the applicant makes no effort to explain the application of FMCSA’s action to its request, except to note that FMCSA’s determination

also involved modification of the actual knowledge standard. FMCSA's actions to amend the standard in its 2021 rulemaking have no bearing on OTETA authorities or the respective roles of DOT and HHS in permitting the testing of new specimens, and this argument must be disregarded." The National Waste and Recycling Association commented that if approved that hair testing not be mandated for all regulated carriers, and The National School Transportation Association requested that hair testing be an option, not a required method of testing. The Sikh Coalition/North American Punjabi Trucking Association raised the issue of false positives and faith-based accommodations.

Sixty-five other individuals/small motor carriers also opposed the request, many of whom raised the issue of adding to the current driver shortage and supply chain disruption issues indicating that it is extremely difficult to attract and retain drivers in this industry and granting this exemption request will only make it that much harder. Others in opposition claimed that hair testing is not a 100% accurate testing method.

Those filing comments in support of the exemption request include the American Trucking Associations, Inc., the Truckload Carriers Association, the Institute for Safer Truckers/Road Safe America, and the Independent Carrier Safety Association. Including the applicant, the following truckload carriers – most of whom are members of the Trucking Alliance, filed individual comments in support of the request: J.B. Hunt; Knight-Swift Transportation; Maverick Transportation; Werner Enterprises; Schneider; KLLM/Frozen Foods Express; Cargo Transporters; Roehl Transport and Dupre Logistics, LLC. The Trucking Alliance and several of its member companies commented that nothing in the Federal statute prohibits FMCSA from implementing what Congress specifically directed the Secretary of Transportation to do – recognize hair testing as an acceptable alternative to urine testing. Another predominant "theme" from supporting comments is that hair drug testing is a proven indicator of prior illegal drug use and, in fact, is a more reliable indicator of illegal drug use than a urinalysis test. Others in

support commented that hair testing should be allowed, and positive test results from hair testing should be reported in the DACH.

VI. FMCSA Safety Analysis and Decision

The applicant requests an exemption that amend the definition of “actual knowledge” to include the employer’s knowledge of driver’s non-DOT positive hair test results, which would require such results be reported to the Clearinghouse. FMCSA evaluated the application and public comments. The Agency denies the exemption request because, as explained above in Section III. and in the August 24, 2022 Notice, FMCSA’s current statutory authorities do not allow FMCSA to grant the requested exemption. 49 U.S.C. 31306(c)(2) requires that FMCSA follow the HHS scientific and technical guidelines for hair testing, including mandatory guidelines establishing comprehensive standards and procedures for every aspect of laboratory testing (and “requiring the use of the best available technology to ensure the complete reliability and accuracy of controlled substances tests”), the minimum list of controlled substances for which individuals may be tested, standards for review and certification of laboratories that conduct hair testing, and laboratory protocol and cut-off levels for hair testing to detect controlled substances use. The HHS issued proposed Hair Mandatory Guidelines for Federal Workplace Drug Testing Programs (HMG) in 2020 for public comment but has not issued a final version of the HMG.

The applicant asserts that FMCSA does have the statutory authority to grant its exemption request, citing 49 U.S.C. 31306a(b)(B)(ii), which requires that FMCSA adopt regulations permitting pre-employment hair testing for controlled substances as an alternative to urine testing for CMV operators and for random testing if the operator was subject to pre-employment hair testing. By ignoring the requirement that FMCSA follow the HHS mandatory guidelines for hair testing, set forth in 49 U.S.C. 31306(c)(2), the applicant effectively argues that this provision be read in isolation. This approach

disregards an accepted standard of statutory construction, which provides that statutory text must be construed as a whole. The Committee Report accompanying the enactment of 49 U.S.C. 31306a(b)(B)(ii) confirms this is precisely what Congress intended: “[t]he FMCSA has informed the conferees, and the conferees agree that *nothing in* [31306a(b)(B)(ii)] *authorizes the use of hair testing as an alternative to urine tests until the U.S. Department of Health and Human Services establishes federal standards for hair testing*” (emphasis added). Accordingly, the Agency currently lacks the authority to permit an employer’s actual knowledge of a driver’s positive hair test results to be a basis for determining that a driver has violated 49 CFR part 382, subpart B, by engaging in the prohibited use of controlled substances and to permit such results be reported to the Clearinghouse.

For the above reasons, the Trucking Alliance’s exemption application is denied.

Robin Hutcheson,

Administrator.

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